

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Implementation of the Telecommunications Act of 1996 |) | CC Docket No. 96-115 |
| |) | |
| Telecommunications Carriers' Use of Customer |) | |
| Proprietary Network Information and |) | |
| other Customer Information; |) | |
| |) | |
| Petition for Rulemaking to Enhance Security and |) | RM-11277 |
| Authentication Standards for Access to Customer |) | |
| Proprietary Network Information |) | |

**THE REPLY COMMENT OF
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The Pennsylvania Public Utility Commission (PaPUC) hereby submits this Reply Comment in response to the Comments filed in this Notice of Proposed Rulemaking (NOPR). This Reply Comment should not be construed as binding on the PaPUC in any proceeding before the PaPUC.

The PaPUC's Reply Comment reflects statutory limits on our ability to impose reporting obligations on carriers, absent a proceeding to examine the cost and benefits of any additional reporting obligation, beyond those listed in Section 3015(f) of the Pennsylvania Public Utility Code, 66 Pa.C.S. §3015(f). The Reply Comment also addresses the Comments given that Pennsylvania law generally provides more privacy protections than federal law. 66 Pa.C.S. §3019(d). Finally, the Reply Comment reflects Section 102 of the Pennsylvania Public Utility Code, 66 Pa.C.S. §102, holding that cellular service does not otherwise constitute public utility service as defined in the Public Utility Code.

The PaPUC suggests that the FCC consider rejecting Comments which urge the FCC to hold that only federal requirements should govern any release of CPNI. Given that Pennsylvania law provides greater protection for privacy and that Pennsylvania law limits the ability to impose additional reporting obligations, the PaPUC suggests that the FCC permit states to supplement federal efforts and determine whether they are willing to enforce federal requirements. The PaPUC again suggests that the FCC consider the fact that states like Pennsylvania have privacy protections that can be more stringent than federal standards.¹ The PaPUC also suggests that the consumers in any state that declines to enforce federal requirements be referred to the FCC.

The second suggestion addresses the wisdom of preserving the provisions on “opt in” and “opt out” consent. The PaPUC again suggests that the FCC consider rejecting those Comment urging the FCC to deem a customers’ failure to object to a release to mean they have consented to a release of CPNI (the “implied consent” or “Opt Out” approach).

The PaPUC again suggests that the FCC consider a regulatory structure that authorizes the release of CPNI only with a customer’s affirmative express consent (the “prior authorization” or “Opt In” approach). The consent or prior

¹As noted in the PaPUC’s earlier Comment, the Pennsylvania Constitution and the Pennsylvania courts impose stricter privacy standards. *Commonwealth v. Schaeffer*, 536 A.2d 354, 360 (1987) (Pennsylvania Constitution /Article I, §8 offers more protection to the right of privacy than exists in the federal regime); *In re: B*, 394 A.2d 418, 425 (1978)(Pennsylvania Supreme Court recognizes that some Pennsylvania rights of privacy are more stringent than the federal equivalent); *Commonwealth v. Stenger*, 609 A.2d 796, 800 (Supreme Court rejects the flexible approach and holds that only a compelling state interest may warrant disclosure of personal matters). In addition, Section 3019(d) of the Pennsylvania Public Utility Code prohibits a telecommunications carrier from disclosing any information relating to a customer’s pattern of use, equipment, and network information and any accumulated records about customers, with the exception of the name, address, and telephone number, unless otherwise disclosed pursuant to a court order or permitted by other state and federal law. Moreover, the Commission’s regulations at 52 Pa.Code §63.131 through 137 contain detailed requirements addressing the confidentiality of customer communications and information. The PaPUC

authorization to release of CPNI could be oral, written, or by electronic means.

The PaPUC repeats that suggestion because unauthorized releases of CPNI, in addition to violating any federal standard, may also violate Section 3019(d) of the Pennsylvania Public Utility Code and our regulations governing the Confidentiality of Customer Communications and Information in Sections 63.131 through 137, 52 Pa.Code §§63.131-137 of our regulations. Given Pennsylvania law, the PaPUC suggests that the FCC consider a requirement that the carrier inform the customer whenever there is an unauthorized release of CPNI outside the scope of the customer's opt-in approval. This suggestion is also premised on the customer's responsibility to respond as opposed to imposing detailed regulations on carriers independent of any customer concern. The PaPUC suggests that this approach should minimize compliance and, ultimately, consumer costs.

Third, the PaPUC suggests that the FCC consider adoption of the Verizon Comment proposing a "safe harbor" approach in which good faith conduct may, in appropriate circumstances, alleviate a carrier of responsibility for violation of CPNI rules. This approach could be developed, following issuance of final rules, by convening a stakeholder working group charged with preparing recommendations and policies on protecting privacy in a cost-effective manner. Any working group initial report should be submitted within one year of issuance of any federal rules.

The PaPUC further suggests that the FCC consider the Comments urging the FCC to focus on the actions of data brokers and pretexting. The Comments indicate that those entities constitute a significant source of CPNI violations.

investigated issue of identity theft at Docket M-00041811 and developed approaches for the protection of private information in order to mitigate instances of identity theft.

The PaPUC makes this suggestion because an effective regulatory approach to data brokers and pre-texting entities may be more effective than the imposition of detailed regulations imposed on carriers that service these entities. The PaPUC further suggests that the FCC consider an approach that utilizes carrier arrangements with these entities as a regulatory vehicle for imposing accountability requirements on data brokers and pre-texting. The PaPUC also recognizes that legislation to specifically address this kind of fraudulent access to and sales of data may be necessary.

The fourth suggestion involves any unauthorized release of CPNI. The PaPUC suggests that, in addition to violating any federal law, the release may also violate Section 3019(d) of the Pennsylvania Public Utility Code, 66 Pa.C.S. §3019(d). Pennsylvania law generally emphasizes an “opt –in” approval approach. Given Pennsylvania law on privacy, the FCC should consider a final rule in which any carrier must inform the customer whenever there is an unauthorized release of CPNI outside the scope of the customer’s opt-in approval.

The PaPUC recognizes that some Comments oppose additional notice obligations. However, Pennsylvania law imposes this obligation notwithstanding the cost. The PaPUC suggests that the FCC consider and address this sort of state interest in a manner that minimizes the impact on state laws.

Next, the PaPUC notes that most Comments do not address the issue of state law enforcement except to suggest referral to the Federal Trade Commission or a federal certification requirement. However, the Comment of the Attorneys General emphasizes that violations affect security and state law enforcement programs. Given this consideration, the PaPUC again suggests

that the FCC consider an approach in which the state commissions and the FCC can jointly conduct investigations, develop requirements, or impose penalties for violation of the FCC's CPNI rules.

An approach that may warrant consideration is one wherein federal requirements operate as a regulatory floor and not a regulatory ceiling. States could be permitted to enforce federal rules and supplement federal rules so long as they do not unduly burden interstate commerce and advance an important state interest such as Pennsylvania's privacy standards. This approach warrants consideration because it creates a form of cooperative federalism that may be more palatable than preemption and delegation of federal authority.

The PaPUC's suggests that the FCC carefully evaluate the concern expressed in other Comments about the importance of an effective consumer education program. The FCC should consider a customer-education campaign following enactment of any regulations.

Given that the FCC'S current regulations require that carriers maintain a record of all instances where CPNI is disclosed to third parties or where third parties were allowed access to CPNI, *See* 47 C.F.R. §64.2009(c), the FCC should consider an ancillary approach in which carriers educate customers about their rights and duties as well.

One approach could be a process in which the carriers provide annual notices to their consumers that the carriers retain data on disclosures or access to a customer's CPNI. The customers could also be informed of this retention policy as well as the consumers' right to request this data to determine if there have been any unauthorized releases. This approach makes it the consumer's duty to contest or challenge any unauthorized disclosure. The PaPUC's suggestion is modeled on the credit card industry wherein customers are usually

given an annual notice and advised to review the results to make sure no unauthorized cards are issued or that information is released.

However, the PaPUC suggests that the costs for any federal program are more properly supported from interstate revenues. Federal programs costs should not be recovered from intrastate revenues and services.

The PaPUC makes this suggestion given the possible long-term implications of federalizing traditional state functions such as CPNI protection. The federalization and centralization of matters traditionally within the states' authority, and supported by assessments on intrastate revenues, may be undermined by policies that federalize the subject matter and treat the revenues as interstate revenues. This process may make it very difficult for the states to assess intrastate services and revenues even if those assessments also support ancillary federal efforts if those services and revenues are no longer intrastate in nature.

Given these considerations, the PaPUC suggests that the FCC consider an approach in which the state commissions and the FCC are jointly empowered to conduct investigations, develop additional requirements, or impose penalties for violation of the FCC's CPNI rules. Federal rules should be a regulatory floor and not a ceiling. State authorities should be permitted to enforce federal rules or supplement federal rules, and fund those efforts by assessments, so long as those rules do not unduly burden interstate commerce and advance an important state interest such as Pennsylvania's privacy interest.

The PaPUC fully realizes that there may be no need to authorize two regulatory agencies to simultaneously pursue the same issue. The PaPUC suggests that the agency receiving the customer's complaint pursue the matter.

If, for example, a customer files a complaint with the FCC, the state regulator awaits resolution of the federal proceeding. On the other hand, if a customer files a complaint with the state regulator, the state regulator would examine the matter. An unhappy customer could file an objection with the state's decision with the FCC.

The PaPUC appreciates the opportunity to file these Reply Comments.

Respectfully submitted,
Pennsylvania Public Utility Commission

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